

1 **WO**
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Stacy Jones,
10 Plaintiff,
11 v.
12 Ryan D. McCarthy,¹ Secretary of the Army,
13 Defendant.

14
15 No. CV-17-00616-TUC-JGZ

16 **ORDER**

17 Plaintiff Stacy Jones, a civilian employee of the Department of the Army, alleges
18 employment discrimination on the basis of race and sex, and retaliation for participating in
19 protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42
20 U.S.C. § 2000(e). Defendant seeks summary judgment on Jones's claims. (Doc. 57.)
21 Jones filed a response to Defendant's Motion. (Doc. 63.) For the following reasons, the
22 Court will grant Defendant's Motion for Summary Judgment.

23 //
24 //
25 //
26 //

27

¹ Jones filed this action against Robert M. Speer, Acting Secretary of the Army.
28 Ryan D. McCarthy was subsequently appointed as Secretary of the Army. Therefore,
pursuant to Fed. R. Civ. P. 25(d), Secretary McCarthy is substituted as the named
defendant.

1 **I. Background²**

2 Jones's claims arise out of her employment as Director of Army Community
 3 Services (ACS) at Fort Huachuca, Arizona, a position she held until 2015. (Doc. 58, ¶ 1.)
 4 During Jones's tenure as ACS Director, Dennis Maruska, Director of Family Morale,
 5 Welfare and Recreation, Fort Huachuca, was Jones's first-level supervisor, and Thomas
 6 Borer, Deputy Garrison Commander, was Jones's second-level supervisor. (*Id.* at ¶ 2.)
 7 Colonel Thomas Boone became the Fort Huachuca Garrison Commander and Jones's
 8 third-level supervisor in April 2014. (*Id.* at ¶ 3.)

9 In October 2012, Jones was removed from her position as ACS Director and detailed
 10 to a nonsupervisory position based on allegations that she misappropriated funds and
 11 created a hostile work environment. (*Id.* at ¶ 4.) Jones filed an EEO complaint alleging she
 12 was removed from her position because of her race, sex, religion, and in retaliation for
 13 bringing to the attention of the Chief, Installation Management Command (IMCOM),
 14 alleged negative comments made by Colonel Faulkner about victims of sexual assault. (*Id.*
 15 at ¶ 5; Doc. 63, pp. 6, 10; Doc. 63-2, p. 23.)

16 On April 2, 2014, Jones resolved her 2012 EEO complaint through a negotiated
 17 settlement agreement (2014 NSA). (*Id.* at ¶ 6.) Under the terms of the 2014 NSA, Jones
 18 was reinstated as ACS Director and Jones withdrew her EEO Complaint. (Doc. 58, ¶ 7;
 19 Doc. 63-2, pp. 54-57.) Jones also waived any right to commence further litigation
 20 "concerning the matters raised in, or reasonably related to, the allegations contained in . . .
 21 [the subject] EEO complaint." (Doc. 63-2, p. 56.)

22 Jones alleges Maruska had a meeting with her two or three days after she was
 23 reinstated and told her that Borer and Colonel McFarland, the garrison commander who
 24 succeeded Faulkner, were upset with him because "he didn't do what he needed to do to

25 ² Although the Court struck Jones's Statement of Facts (Doc. 64) for failure to
 26 comply with LRCiv. 56.1(b), and gave Jones the opportunity to file a statement of facts in
 27 compliance with the rules (Doc. 65), she did not do so. Nonetheless, the facts asserted by
 28 the parties in their memorandum and by the Defendant in its statement of facts are largely
 undisputed. Moreover, the Court notes that Jones's stricken three-page statement of facts
 contains only one fact that is not asserted in Jones's response and that additional fact is
 unsupported.

1 “get rid of [Jones].” (Doc. 58, ¶ 8.)

2 On November 14, 2014, Jones filed a second EEO Complaint alleging numerous
3 actions by Boone, Borer and Maruska with respect to duty assignments, training,
4 performance, and creating an alleged hostile work environment, motivated by race, gender
5 and reprisal, including: failing to align the Sexual Harassment and Response Program
6 (SHARP) under ACS; making negative statements regarding Jones’s return as ACS
7 Director; taking duties and authority from her; and directing Jones’s subordinate budget
8 personnel to report ACS budget concerns regarding the Table of Distribution and
9 Allowances directly to Resource Management. (*Id.* at ¶ 9.) In December 2014, Jones
10 amended her EEO complaint to include additional allegations of discrimination and
11 retaliation. (*Id.* at ¶ 10.)

12 On February 3, 2015, Jones and Installation Management Command Headquarters
13 (IMCOM HQ) executed a negotiated settlement agreement (2015 NSA) to resolve the
14 second EEO complaint, in which the parties agreed that Jones would be reassigned from
15 her position as ACS Director in Fort Huachuca to a nonsupervisory position as an analyst
16 at IMCOM HQ in San Antonio, Texas, within 60 days of execution of the agreement. (*Id.*
17 at ¶12.) Jones agreed to withdraw her EEO complaint, accept the terms of the agreement
18 in full settlement of all matters related to the EEO Complaint, and refrain from seeking
19 further action, including lawsuits, “concerning the issues, claims or facts” contained in the
20 EEO Complaint. (*Id.*) The 2015 NSA became effective on the date it was signed by all
21 parties – February 3, 2015. (*Id.*) Dan Davis, IMCOM HQ Chief of Staff, signed the 2015
22 NSA on behalf of IMCOM HQ. (*Id.* at ¶ 13.) Davis made arrangements for Jones to have
23 a position in San Antonio. (*Id.* at ¶ 14.) Jones never worked for Davis and Davis was not
24 in Jones’s supervisory chain of command at Fort Huachuca. (*Id.* at ¶ 15.)

25 After signing the 2015 NSA, Jones requested to modify the agreement to allow
26 additional time for her to move to Texas. (*Id.* at ¶¶16, 17, 18.) On February 25, 2015, the
27 parties executed a written modification allowing Jones until May 31, 2015 to report to San
28 Antonio. (*Id.* at ¶ 18.) All other provisions of the 2015 NSA remained in effect and valid.

1 (Id. at ¶ 19.) Jones's supervisors, Maruska, Borer and Boone, were not involved in
 2 negotiating the 2015 NSA or its modification. (Id. at ¶ 20.)

3 In May 2015, Jones reported to Fort Sam Houston, Texas. (Id. at ¶ 21.) Jones
 4 continues to work for the Army. (Id. at ¶ 22.)

5 On July 19, 2017, Jones filed this action. (Doc. 1.) Jones seeks relief under Title
 6 VII, alleging claims of disparate treatment, hostile work environment, retaliation, and
 7 constructive discharge, as a result of: (a) the 2015 NSA, under which she was reassigned
 8 from Fort Huachuca, Arizona, to IMCOM HQ, San Antonio, Texas; (b) her March 9, 2015
 9 removal from consideration to join the board of directors of Sierra Vista Regional Hospital;
 10 (c) Maruska denying her access to the ACS Table of Distribution and Allowances (TDA);
 11 failing to include her, on March 18, 2015, in decisions regarding the TDA; and directing
 12 subordinate personnel to report ACS budget concerns regarding the TDA directly to
 13 Resource Management; (d) sometime after June 2014, Boone, Borer and Maruska denying
 14 Jones's request to place SHARP under ACS, but placing SHARP under ACS after she
 15 transferred to San Antonio; and (e) on June 25, 2015, after Jones transferred to San
 16 Antonio, Lieutenant Colonel Gabriel Mesa, interim ACS Director, encouraging ACS
 17 employees to file worker's compensation claims if they felt Jones's actions negatively
 18 affected them while she was their supervisor. (Id. at ¶ 23.) Jones, who is African
 19 American, alleges that these acts were motivated by race, sex, and retaliation for engaging
 20 in protected activity. (Id.)

21 Defendant seeks summary judgment, arguing that Jones's claims relating to
 22 reassignment, SHARP realignment and TDA/delegation are barred by the 2015 NSA and
 23 the remainder of the claims fail for lack of evidence. (Doc. 57.)

24 **II. Summary Judgment Standard**

25 Summary judgment is appropriate when: (1) the movant shows that there is no
 26 genuine dispute as to any material fact; and (2) that after viewing the evidence most
 27 favorably to the non-moving party, the movant is entitled to prevail as a matter of law. Fed.
 28 R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins.*

1 *Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). “Only disputes over facts that might
 2 affect the outcome of the suit under the governing [substantive] law will properly preclude
 3 the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
 4 (1986). A “genuine issue” of material fact arises only “if the evidence is such that a
 5 reasonable jury could return a verdict for the nonmoving party.” *Id.*

6 When considering a motion for summary judgment, the court accepts as true the
 7 non-moving party’s evidence, if it is supported by affidavits or other evidentiary material.
 8 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The non-moving party may not
 9 merely rest on its pleadings; the non-moving party must produce some significant probative
 10 evidence tending to contradict the moving party’s allegations, thereby creating a material
 11 question of fact. *Anderson*, 477 U.S. at 256–57 (holding that plaintiff must present
 12 affirmative evidence to defeat properly supported motion for summary judgment); *see also*
 13 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)
 14 (nonmovant must present more than “some metaphysical doubt as to the material facts”).
 15 A summary judgment motion cannot be defeated “with allegations in the complaint, or
 16 with unsupported conjecture or conclusory statements.” *Hernandez v. Spacelabs Med.*
 17 *Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). “Summary judgment must be entered ‘against a
 18 party who fails to make a showing sufficient to establish the existence of an element
 19 essential to that party’s case, and on which that party will bear the burden of proof at trial.’”
 20 *United States v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at
 21 322).

22 **III. Discussion**

23 **A. Claims precluded by the 2015 NSA**

24 Defendant asserts that the 2015 NSA precludes Jones’s claims for discrimination,
 25 retaliation, and hostile workplace for claims relating to her reassignment to San Antonio,
 26 the SHARP realignment, TDA decisions and delegation of duties, and critical statements
 27 by her supervisors which were all part of her 2014 EEO complaint. (Doc. 57, pp. 9-11.)
 28 The Court agrees.

1 “[P]ublic policy favors voluntary settlement of employment discrimination claims
2 brought under Title VII.” *Stroman v. W. Coast Grocery Co.*, 884 F.2d 458, 460–61 (9th
3 Cir. 1989) (quotation marks and citation omitted). A release of Title VII claims is valid if
4 it was a “voluntary, deliberate, and informed waiver.” *Id.* (internal quotation marks and
5 citation omitted). Generally, in civil rights cases, the party attempting to enforce the release
6 bears the burden of establishing its validity. *Judie v. Hamilton*, 872 F.2d 919, 924 (9th Cir.
7 1989) (citing *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981)). “The determination of
8 whether a waiver of Title VII was ‘voluntary, deliberate, and informed’ is predicated upon
9 an evaluation of several indicia arising from the circumstances and conditions under which
10 the release was executed.” *Stroman*, 884 F.2d at 462 (internal quotation marks and citation
11 omitted). The court considers “the clarity and lack of ambiguity of the agreement, the
12 plaintiff’s education and business experience, the presence of a noncoercive atmosphere
13 for the execution of the release, and whether the employee had the benefit of legal counsel.”
14 *Id.* (internal quotation marks and citations omitted). Applying these factors, the Court
15 concludes that Jones’s waiver of her Title VII claims was voluntary, deliberate and
16 informed.

17 The terms of the 2015 NSA are clear. The agreement is short, with the main
18 settlement provisions contained in paragraphs three and four. In Paragraph 3, Defendant
19 agreed to reassign Jones to a Management Analyst position at Fort Sam Houston, pay for
20 her relocation expenses, including realtor fees, and process her travel vouchers within sixty
21 days. In Paragraph 4, Jones agreed to withdraw her EEO complaint, relocate to Fort Sam
22 Houston, and accept the terms of the agreement in full settlement of all matters related to
23 the EEO Complaint, including to refrain from seeking further action, including lawsuits,
24 “concerning the issues, claims or facts” contained in the 2014 EEO Complaint. (Doc. 58,
25 ¶ 12.)

26 The parties do not provide information about Jones’s education and business
27 experience, but her position and responsibilities show that she possesses the level of
28 education and experience necessary to understand the agreement. Jones testified that as

1 the Director of Army Community Services she was responsible for oversight of Family
2 Programs for the Army, which included services to support families and veterans, including
3 Family Advocacy, Financial Readiness, Information and Referral, Lending Closet,
4 Exceptional Family Member Program, and Survivor Outreach. (Doc. 58-2, p. 9.)
5 Moreover, Jones was familiar with the EEO process, including settlement; a year earlier,
6 Jones resolved her October 2012 EEO Complaint by entering into the 2014 NSA with the
7 Defendant. (*Id.* at ¶ 6.) In addition, on February 25, 2015, Jones, on her own, successfully
8 requested and received a modification of the 2015 agreement, increasing her time to report
9 to Houston by approximately sixty days. (*Id.* at ¶¶ 17-18.)

10 It does not appear that Jones was represented by counsel at the time she entered into
11 the 2015 NSA. There is no information as to whether employment of counsel was
12 discussed. Jones was represented by counsel in the 2014 NSA. (Doc. 63-2, pp. 55, 57.)

13 Finally, there is no indication that there was a coercive atmosphere for the execution
14 of the agreement. Jones's supervisors were not involved in any way with the NSA, in
15 which Dan Davis, IMCOM Chief of Staff, acted on behalf of the Defendant. (*Id.* at ¶¶ 13-
16 14, 20.) Jones never worked for Davis and Davis was not in Jones's supervisory chain of
17 command at Fort Huachuca. (*Id.* at ¶ 15.)

18 Jones's deposition testimony further supports the Court's conclusion that Jones's
19 decision to enter into the 2015 NSA was voluntary, deliberate, and informed. She testified
20 that she signed the NSA due to the working conditions at Fort Huachuca and to put the
21 issues raised in her EEO Complaint behind her. (*Id.* at ¶¶ 27, 28.) She testified that she
22 understood everything in the agreement when she signed it, and, at that time, she had
23 resolved to transfer to San Antonio. (*Id.* at ¶¶ 29, 30.) She admitted that no one told her
24 she would lose her job or otherwise threaten her if she did not sign the 2015 NSA. (*Id.* at
25 ¶¶ 25, 26.)

26 Jones does not respond to Defendant's argument that the 2015 NSA bars her claims
27 related to her reassignment to San Antonio, the SHARP realignment, TDA decisions and
28 delegation of duties, and critical statements by her supervisors. In her Response argument

1 pertaining to constructive discharge, she makes two assertions which are arguably relevant
 2 to the enforceability of the 2015 NSA—that she was bullied into taking the reassignment
 3 to San Antonio and that she was threatened with termination if she did not go. (Doc. 63, p.
 4 11.) Neither supports an inference that Jones was forced to sign the 2015 NSA or
 5 threatened with termination if she did not. Jones’s deposition transcript establishes that
 6 what she characterizes as bullying and threats occurred after she had entered into the 2015
 7 NSA, and related only to her statements that she wanted to withdraw from the agreement.
 8 Jones testified that “after I signed an NSA to relocate, I changed my mind and I told Mr.
 9 Carruthers I did not want to leave. Mr. Carruthers told me I had to leave or lose my job.”
 10 (Doc. 63-2, pp. 47-48.) Jones’s subsequent change of heart about entering into the
 11 agreement is insufficient to undo the agreement. At that point, she had voluntarily resolved
 12 her claims in an enforceable agreement. *See Worthy v. McKesson Corp.*, 756 F.2d 1370,
 13 1373 (8th Cir. 1985) (“If a party to a Title VII suit who has previously authorized a
 14 settlement changes his mind ..., that party remains bound by the terms of the agreement.”)
 15 (quotation marks and citation omitted); *see also Dacanay v. Mendoza*, 573 F.2d 1075, 1078
 16 (9th Cir. 1978) (“Assuming both the power of the attorney to bind his client and the validity
 17 of the agreement struck, a litigant can no more repudiate a compromise agreement than he
 18 could disown any other binding contractual relationship.”)³

19 For the foregoing reasons, based on the undisputed evidence, the Court concludes
 20 that the 2015 NSA bars Jones’s claims for discrimination and retaliation based on her
 21 reassignment to San Antonio,⁴ the SHARP realignment, TDA decisions and delegation of
 22

23 ³ In Jones’s Statement of Facts, which the Court struck, Jones asserts only one fact
 24 that is not mentioned in her Response—that she changed her mind regarding transfer within
 25 the seven-day rescission period. (Doc. 64, p. 2.) Jones fails to cite any evidence that
 26 supports her assertion that there was a seven-day rescission period. The agreement does
 not include a rescission period. It states: “This agreement will become effective on the
 date it is signed by all parties,” which was February 5, 2015. (Doc. 58-2, p. 78.) As noted
 above, Jones does not address the effect of the 2015 NSA in her response; nor does she
 argue rescission.

27 ⁴ Jones characterizes her transfer to San Antonio as a constructive discharge. To the
 28 extent such characterization is valid, Jones’s constructive discharge claim fails for the
 additional reason that she did not resign from the Army. (Doc. 58, ¶ 22.) Resignation is a
 necessary element of a constructive discharge claim. *See Green v. Brennan*, ___ U.S. __,

1 duties,⁵ and critical statements by her supervisors. *See Pardi v. Kaiser Found. Hosps.*, 389
 2 F.3d 840, 848 (9th Cir. 2004) (affirming summary judgment enforcing release of ADA
 3 claims where plaintiff failed to introduce evidence showing that the agreement was
 4 procured by duress or other basis that would render it invalid).⁶

5 **B. Jones fails to establish the elements of a claim for race, sex or discrimination
 6 or retaliation for her remaining claims.**

7 **1. Applicable Law**

8 To establish a prima facie claim for discrimination under Title VII, Jones must either
 9 provide direct evidence suggesting that an employment decision was made based on an
 10 impermissible criterion, or meet the four-part *McDonnell Douglas* test for circumstantial
 11 evidence. *See EEOC v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009). That four-part
 12 test requires Jones to show that she: (1) belongs to a protected class; (2) was qualified for
 13 the position; (3) was subject to an adverse employment action; and (4) similarly situated
 14 individuals outside her protected class were treated more favorably. *Moran v. Selig*, 447
 15 F.3d 748, 753 (9th Cir. 2006). To establish a prima facie case of retaliation under Title
 16

17 136 S.Ct. 1769, 1777 (2016) (constructive discharge requires proof that (1) the employee
 18 was discriminated against by her employer to the point where a reasonable person in her
 position would have felt compelled to resign, and (2) she actually resigned).

19 ⁵ As noted above, Jones does not respond to Defendant's argument that claims
 20 related to the TDA decisions and delegation of duties are barred by the 2015 NSA. The
 21 Court notes that the TDA claims relate to conduct that allegedly occurred in March 2015,
 22 after the NSA took effect. The March 2015 claims, however, cover the same issues that
 23 Jones raised in her 2014 EEO Complaint—Jones's authority as ACS Director to have input
 24 into the ACS budget and Defendant's delegation of her authority to her subordinates.
 Because Jones's duties and responsibility for the ACS TDA and budget “concern[] the
 issues, claims or facts” contained in her 2014 EEO Complaint, these claims are barred by
 the 2015 NSA. In addition, because Jones agreed in the 2015 NSA to resign as ACS
 Director, it cannot be said to be discriminatory to not allow her to perform the
 responsibilities of that position.

25 ⁶ To the extent that Jones is also asserting claims related to or based on facts
 26 underlying claims she asserted in her 2012 EEO Complaint (relieving Jones of her duties
 27 as ACS Director and moving Jones's office to “isolation” in a chapel—both in October
 28 2012) (Doc. 63, p. 6), those claims are similarly barred by Jones's 2014 NSA, in which
 Jones, who was represented by counsel, waived her right to pursue claims based on the
 same conduct. (See Doc. 58, ¶¶ 4-7; Doc. 63-2, pp. 54-57.) Jones does not dispute either
 the applicability of this release provision or its enforceability.

1 VII, Jones must show (1) she was engaged in a protected activity, (2) she was thereafter
 2 subjected by her employer to an adverse employment action,⁷ and (3) there was a causal
 3 link between the protected activity and the adverse employment action. *Thomas v. City of*
 4 *Beaverton*, 379 F.3d 802, 811 (9th Cir. 2004).

5 “After a prima facie case is established, the burden then shifts to the defendant to
 6 articulate a legitimate nondiscriminatory reason for its employment decision. Then, in
 7 order to prevail, the plaintiff must demonstrate that the employer’s alleged reason for the
 8 adverse employment decision is a pretext for another motive which is discriminatory.” *Lam*
 9 *v. Univ. of Haw.*, 40 F.3d 1551, 1559 (9th Cir. 1994) (internal quotation marks and citation
 10 omitted). Retaliation claims are included within this framework. *Id.* at n.11 (citations
 11 omitted).

12 **2. Analysis**

13 There are two claims alleged in Jones’s First Amended Complaint which are not
 14 precluded by her prior NSAs. Neither, however, is supported by any evidence.

15 **a. Removal from consideration for the Sierra Vista Regional Hospital
 16 board of directors.**

17 Jones offers no support for her claim that her supervisors prevented her from being
 18 selected to serve on the board of directors of Sierra Vista Regional Hospital, let alone that
 19 they did so for a discriminatory or retaliatory purpose. Jones’s Response does not address
 20 Defendant’s arguments on this point or mention the board position. (Doc. 63.) The
 21 undisputed evidence presented by Defendant shows that the hospital has no connection to

22 ⁷ “[A] wide array of disadvantageous changes in the workplace constitute adverse
 23 employment actions.” *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir.2000); *see also*
 24 *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1125 (9th Cir. 2000)
 25 (adverse action not only applies to terms and conditions of employment “in the narrow
 26 sense, but ‘evinces a congressional intent to strike at the entire spectrum of disparate
 27 treatment . . . in employment.’”) (*quoting Oncale v. Sundowner Offshore Servs., Inc.*, 523
 28 U.S. 75, 78 (1998)). Adverse employment actions can include a transfer of job duties,
 undeserved performance ratings, transfers to another job of the same pay and status, and
 dissemination of unfavorable job references. *Ray*, 217 F.3d at 1242 (citations omitted).
 Additionally, for purposes of a Title VII retaliation claim, “an action is cognizable as an
 adverse employment action if it is reasonably likely to deter employees from engaging in
 protected activity.” *Id.* at 1243 (footnote omitted).

1 Fort Huachuca. (*See* Doc. 57, p. 11 (citing Doc. 58, ¶ 37).) Jones met briefly about board
 2 membership with someone whom she believed to be on the board and whose name she
 3 does not remember. (Doc. 58, ¶ 38). Jones understood that the person she spoke to would
 4 contact her supervisors for a reference. (*Id.*) Jones was not contacted again about the board
 5 position. (*Id.* at ¶¶ 38-39.) Jones has no firsthand knowledge as to why the hospital did
 6 not select her for the board. (*Id.* at ¶ 45.) Jones does not know who would have made the
 7 decision whether to select her for the board. (*Id.* at ¶ 43) Jones's immediate supervisors,
 8 Maruska and Borer, had no knowledge about this matter. (*Id.* at ¶ 46.) Summary judgment
 9 is properly entered for Defendant on this claim.

10 **b. Worker's compensation claims.**

11 Jones claims that at a June 2015 meeting, Mesa encouraged Jones's former
 12 subordinate employees to file worker's compensation claims against her. (Doc. 58-5, p.
 13 41.) In her Response to Defendant's Motion for Summary Judgment, Jones asserts that it
 14 was Maruska and Borer who made the comments. (Doc. 63, pp. 9-10 (citing Doc. 63-2,
 15 pp. 49-52).) Regardless of the speaker, Jones points to no admissible evidence to support
 16 this claim. Jones did not attend the meeting (Doc. 58, ¶ 78; Doc. 62-2, p. 49); she heard
 17 from someone, whose name she does not recall, that after her departure from Fort
 18 Huachuca, interim ACS Director Mesa held a meeting where he, Maruska, and Borer
 19 encouraged Jones's former subordinates to file such claims against her. (Doc. 58, ¶ 79;
 20 Doc. 63, pp. 9-10 (citing Doc. 63-2, pp. 49-52).) This hearsay evidence is insufficient to
 21 support Jones's claim that these individuals discriminated or retaliated against her.
 22 Moreover, Defendant has provided undisputed evidence that no prohibited conduct
 23 occurred and that there was a legitimate, nondiscriminatory reason for the meeting and the
 24 information provided.⁸ Jones does not respond to or refute Defendant's arguments or

25 ⁸ In a declaration, Mesa states that after becoming interim Director, Mesa received
 26 complaints about Jones's actions prior to her reassignment. (Doc. 58, ¶ 74.) In coordination
 27 with the Fort Huachuca Employee Assistance Program (EAP), Mesa held the meeting to
 28 inform the employees about potential avenues for addressing alleged injuries. (*Id.* at ¶¶
 75, 76.) Mesa did not reference specific individuals or Jones and did not discuss specific
 instances or complaints. (*Id.* at ¶ 76.) The focus of the meeting was to provide information
 about the process for addressing alleged injuries, the availability of EAP, and the action
 employees needed to take to obtain assistance. (*Id.*) Jones has no knowledge that anyone

1 evidence. For all of these reasons, this claim does not survive summary judgment.

2 **C. Jones Fails to Show She was Subjected to a Hostile Work Environment**

3 **1. Applicable law**

4 To prevail on a claim of hostile work environment based on race, sex or retaliation,
 5 Jones must establish that (1) she was subjected to verbal or physical conduct of a harassing
 6 nature that was based on her race or sex or out of retaliation for protected activity, (2) the
 7 conduct was unwelcome, and (3) the conduct was “sufficiently severe or pervasive” to alter
 8 the conditions of her employment and create an abusive working environment. *Fuller v.*
 9 *Idaho Dep’t of Corr.*, 865 F.3d 1154, 1161 (9th Cir. 2017) (sex); *Surrell v. California*
 10 *Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008) (race); *Ray*, 217 F.3d at 1244-45
 11 (retaliation). The conduct must be extreme in order to amount to a change in the terms and
 12 conditions of employment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88
 13 (1998). To determine whether an environment is sufficiently hostile, the court considers
 14 “the totality of the circumstances, including the ‘frequency of the discriminatory conduct;
 15 its severity; whether it is physically threatening or humiliating, or a mere offensive
 16 utterance; and whether it unreasonably interferes with an employee’s work performance.’”
 17 *Ray*, 217 F.3d at 1245 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993));
 18 *see also Kortan v. California Youth Auth.*, 217 F.3d 1104, 1110 (9th Cir. 2000) (mere
 19 utterance of epithet which engenders offensive feelings, without more, does not affect
 20 conditions of employment to sufficiently significant degree necessary for violation of Title
 21 VII) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)). Additionally, Jones
 22 must show that her employer is liable for the conduct that created the environment. *Fuller*,
 23 865 F.3d at 1161 (citation omitted).

24 **2. Analysis**

25 Jones fails to identify any actionable verbal or physical conduct of a harassing
 26 nature, based on race or sex or retaliation, that occurred after the 2015 NSA, or was
 27 actionable. Jones’s allegations concerning Mesa’s alleged encouragement of worker’s

28 filed a worker’s compensation claim as a result of the meeting. (*Id.* at ¶ 80.)

1 compensation claims against Jones does not factor into this analysis because Jones no
 2 longer worked at Fort Huachuca at that time. Therefore, she could not have been subjected
 3 to a hostile workplace as a result of Mesa's conduct. Also, as set forth above, Jones fails
 4 to substantiate her claim that Mesa encouraged such claims.

5 Jones points to inappropriate comments by Maruska and Colonel Faulkner as
 6 evidence of harassment. But Jones fails to demonstrate that either of these comments is
 7 actionable. The first comment was allegedly made by Maruska in May 2014, soon after
 8 she was reinstated as ACS Director pursuant to the 2014 NSA; Maruska told her that Boone
 9 and Borer "were 'mad at him because they didn't want [Jones] to return to the position as
 10 Director,' and that 'he didn't do what he needed to do to get rid of [Jones].'" (Doc. 63, p.
 11 9 (citing Doc. 63-2, pp. 29, 38; Doc. 63-3, pp. 2-3).) Jones reported this comment to the
 12 Director of EEO for IMCOM and the Director of IMCOM Central. (Doc. 63, p. 9 (citing
 13 Doc. 63-3, p. 2: *see also* Doc. 58-4, p. 3, ¶ 20.)) The 2015 NSA prohibits Jones from
 14 pursuing legal action based on Maruska's comment.

15 In a separate section of her Response, Jones also asserts that Colonel Faulkner told
 16 her that he had been "'bullied' by African-Americans as a youth" and made comments to
 17 Plaintiff "about how Black people eat fried chicken and watermelon all the time." (Doc.
 18 63, p. 13 (citing Doc. 63-2, pp. 24-25).) While these statements are certainly offensive,
 19 Jones fails to present evidence to tie the comments to a hostile environment claim because
 20 she does not specify when they were made. Consequently, she cannot establish that the
 21 offensive comments, if made during an actionable time period, affected conditions of
 22 employment to the sufficiently significant degree necessary to establish a violation of Title
 23 VII, an essential element of her claim. *Kortan*, 217 F.3d at 1110. Therefore, Defendant is
 24 entitled to summary judgment on Plaintiff's hostile work environment claim.

25 //

26 //

27 //

28 //

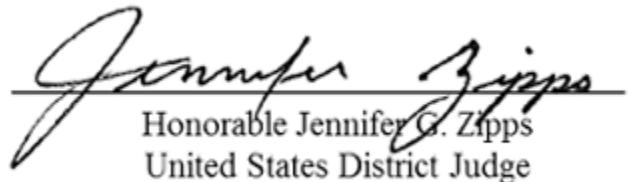
1 **D. Conclusion**

2 For the foregoing reasons,

3 **IT IS ORDERED THAT Defendant's Motion for Summary Judgment (Doc. 57) is**
4 **GRANTED.**

5 The Clerk of Court is directed to enter judgment accordingly and to close the file in
6 this action.

7 Dated this 18th day of August, 2020.

8
9
10 
11 Honorable Jennifer G. Zijps
12 United States District Judge

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28